UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

BRENT MCCALL,	:
Petitioner,	:
	:
-vs-	: No. 3:96cr133 (PCD)
	: No. 3:01cv1048 (PCD)
UNITED STATES OF AMERICA,	:
Defendant.	:

RULINGS ON MOTION TO VACATE SENTENCE, MOTION FOR LEAVE TO FILE AMENDED MOTION TO VACATE AND MOTION FOR RECONSIDERATION OF ORDER RE: MOTION FOR APPOINTMENT OF COUNSEL

Petitioner moves *pro se*[1] for an order vacating the sentence imposed on him by this Court. For the reasons set forth herein, the motion is denied. The motion for leave to file an amended petition and for reconsideration are denied as moot.

I. BACKGROUND

On October 24, 1996, pursuant to a plea agreement,[2] petitioner appeared before this Court, waived indictment, and pleaded guilty to five counts of aggravated bank robbery in violation of 18 U.S.C. § 2113(a), (d), one count of carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c), and one count of unlawfully possessing a destructive device in violation of 18 U.S.C. § 922(g)(1). At the time, petitioner had a number of pending state criminal charges. On February 27,

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1 Although petitioner has appointed counsel for purposes of the present petition, petitioner has manifested dissatisfaction with the performance of his counsel. As his pleading and memorandum were filed *pro se*, petitioner will be given the benefit of the doubt and he will be treated as a pro se petitioner. His pleadings shall thus be construed as raising the strongest argument suggested. *See Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996).

2 On October 27, 1996, the Government agreed, in exchange for petitioner's guilty plea, to recommend a downward departure of three levels for acceptance of responsibility.

1997, petitioner was sentenced to an effective term of imprisonment of 192 months. Petitioner did not appeal the sentence. On January 9, 1998, petitioner was convicted in state court and sentenced to an effective term of imprisonment of forty-five years.

On May 20, 2001, petitioner filed the present petition alleging ineffective assistance of counsel. He specifically argues that (1) his counsel's assistance fell below an objective standard of reasonableness by incorrectly advising him as to the law pertaining to the interaction of state and federal criminal sentences[3] and (2) there is a reasonable probability that, but for counsels errors, petitioner would not have pleaded guilty and would have insisted on going to trial because he would not have agreed to plea had he known that the state could impose sentences consecutive to his federal sentence.[4]

II. DISCUSSION

The Government argues that petitioner's motion is untimely as it was filed over four years after his judgment became final. Petitioner responds that there are exceptional circumstances justifying the delay, and the delay is further attributable to government impediments to his filing of the petition.

Review of a petition filed pursuant to § 2255 may be precluded by action of the one-year statute of limitations applicable thereto. *See Green v. United States*, 260 F.3d 78, 82 (2d Cir. 2001). Events triggering the one-year statute of limitations include:

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3 Specifically, petitioner alleges that "[t]he idea that the plea in federal court secured concurrent sentences was the entire impetus for entering the plea."

4 Petitioner later filed two motions, one seeking to amend the petition to more directly reflect that his decision to enter into a plea agreement was based on erroneous advice from appointed counsel and the latter for reconsideration of this Court's ruling denying his motion for appointment of different counsel. The motions are denied as moot as neither cures the untimeliness of the present petition.

> (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

Petitioner also refers to "extraordinary circumstances," thereby invoking the doctrine of equitable tolling. Equitable tolling applies when "as a matter of fairness where a plaintiff has been prevented in some extraordinary way from exercising his rights." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir.), *cert. denied*, 531 U.S. 840, 121 S. Ct. 104, 148 L. Ed. 2d 63 (2000). Tolling applies only in "rare and exceptional circumstance[s]," *Green*, 260 F.3d at 82, when a petitioner can demonstrate (1) "extraordinary circumstances" preventing the timely filing of the petition and (2) reasonable diligence throughout the period for which tolling is sought. *Smith*, 208 F.3d at 17.

Petitioner argues that §§ 2255(2), (4) and the doctrine of equitable tolling apply because he was unaware of the possibility that the sentence would not be imposed concurrently with state sentences until the state sentence was actually imposed. He further argues that his attempts to file his petition were hindered by his placement in administrative segregation in a state facility and retained counsel's failure to press the matter of his sentencing.

By his own pleadings, petitioner acknowledges that his misconception as to the interaction of state and federal sentences was clarified by the sentences imposed by state court on January 9, 1998.[5]

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[5] In his petition, petitioner alleges that "[i]n October of 1997, I received the first hint that there was a problem with the way my federal sentences worked in relation to my state sentences." Pet. ¶ 15. Furthermore, "[o]n January 13, 1998[,] I was sentenced in Bristol Superior Court after reaching a plea agreement with the State's Attorney Office. . . . Judge Byrne indicate[d] that state time cannot

Even if this were to be credited as the date on which the fact supporting his claim of ineffective assistance of counsel came to light, it is not apparent that petitioner's further delay of over three years would be justified by alleged obstacles created by his conditions of confinement. At that point, if petitioner took issue with his federal sentence, it was his obligation to meet the one-year limitation, whether he chose to do so *pro se* or through counsel. Through petitioner's own allegations and argument, it is evident that he was capable of writing to counsel, that he ultimately retained counsel for purposes of reviewing his sentence, albeit counsel whose performance in that capacity he considers unsatisfactory, and he had access to legal resources, albeit resources he considers to be more tailored to state criminal proceedings rather than federal proceedings, thus he was capable of filing a petition, as he ultimately did, raising his claim as to the illegality of his sentence.[6]

Petitioner does not account for the substantial delay in filing the present petition. Even if state facilities are tailored more toward state criminal proceedings than federal criminal proceedings,

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be run concurrently to federal time."

6 It would appear that this Court's repeated indications at the sentencing held on February 27, 1997, would reasonably indicate to petitioner that state courts would not be directed to order sentences concurrent to the federal sentence. Petitioner was informed as follows: "Of course, it's not going to be in my hands, for all intents and purposes, because what I'll do, I'll have to do here, and in large measure the question of what should be done in the long run, as far as he's concerned, is going to come out of the state court. With the group of cases that I guess he's got against him, and the single case that he has got against him, that will have to be resolved in due course, and they are going to make the decision for all intents and purposes, he's in state custody now, and he will remain in state custody and will be subject to whatever the state's sentence is, which will then be related to the sentence that is imposed here, based on whatever decision is made by one or more of the state judges who eventually deal with those cases. Sentencing, Tr. at 10-11. At the conclusion of sentencing, this Court stated "Now, as I understand the situation, he is in state custody, and therefore, the question of his being surrendered is something that is up to the state. I have no control over that. He's here only on a writ, I presume, and therefore, the marshal is obliged to return him to the state. Now, if he is in any way to be surrendered to the authority and custody of the Bureau of Prisons for the commencement of the service of sentence that I've imposed, that's something that the state has to determine. That is not something that I have any control over whatsoever." *Id.* at 30. If petitioner somehow understood that either by promise or through action of law the federal government would direct state proceedings, the aforementioned exchange would have reasonably indicated that such was not the case.

petitioner was not required to engage in any legal research prior to raising his issue with this Court. Had petitioner raised his claims *pro se* without any citation to legal authority, as was the case with the petition filed, he would have been given the benefit of the doubt and his claims would have been liberally construed to raise the strongest argument suggested. *See Green v. United States,* 260 F.3d 78, 82 (2d Cir. 2001).[7] Congress has seen fit to impose a one-year limitation on the filing of petitions attacking sentences, without regard to whether the petitioner happens to be *pro se* or represented by counsel.[8]

Assuming arguendo that the present petition were timely filed, petitioner's substantive claim would not succeed. A petitioner claiming ineffective assistance of counsel must show that his attorney's conduct "fell below an objective standard of reasonableness" and was "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 688, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Petitioner must provide sufficient evidence to defeat the "strong

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[7] Petitioner alleges that prisoners housed in administrative segregation at Northern Correction Institute, as he was, are not allowed to visit the law library and are instead provided legal assistance through a legal assistance program and through public defender appointment pursuant to state law. Petitioner further refers to letters to the federal public defender's office dated November 21, 1999, and January 16, 2000, for which no response was received as further basis for delay. Accepting this as true, the first indication of petitioner's disagreement as to the nature of his sentence were November 21, 1999, more than two years after his federal sentence was imposed. Petitioner also alleges that "[f]rom February 5, 1997 through February 15, 2000[,] I was confined in the Northern Correctional Institution, the state's 'supermax' prison. Throughout this three year prison I was kept confined to my cell 23 hours per day with no access to a law library. This is why I haven't attacked this sentence sooner." Petition ¶ 25.

[8] Petitioner refers to a letter from this Court dated November 16, 1998. The letter indicates that petitioner was in state custody at the time of his sentencing because of pending state charges, that this Court did not "have the authority to order the concurrent serving of . . . federal and state sentences," and that information gathered from the investigation of state charges would be forwarded to his attorney. The basis for declining to help petitioner in reconciling state and federal sentences was not that petitioner was represented but rather because this Court lacked the authority to dictate the specifics of sentences imposed by state courts. It is further unlikely, contrary to petitioner's argument, that such a request would be construed as a motion attacking the legality of the sentence imposed thus establishing a different date of filing.

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In the context of misinformation from counsel resulting in a guilty plea, petitioner must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). It is not enough for petitioner to simply allege now that he would have opted for trial given the outcome, *see Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993), rather petitioner must establish that he would have insisted on a trial if properly informed.

The evidence provided by petitioner does not overcome the presumption of competency afforded counsel's performance. Petitioner argues that he understood that he would have to first enter a plea in federal proceedings to get concurrent state and federal sentences. Petitioner further argues that he repeatedly asked about concurrent state and federal sentences and was ultimately told by his attorney, Matthew Collins, that he would serve his federal sentence first and would then be returned to the State to serve his remaining sentences. Petitioner's testimony is contradicted by that of Attorney Collins who declares that he informed petitioner of potential benefits for acceptance of responsibility under the sentencing guidelines. Collins Aff. ¶ 4. He further states that

> pursuant to the plea agreement and disposition of his Federal charges, no promises or representations had been made as to whether his federal sentence would be consecutive to or concurrent with any future State sentences. I also advised Mr. McCall that, as there was as yet no State sentence with which the Federal sentence could be concurrent or consecutive, that issue would have to be addressed by the State court following the disposition of his pending State charges. Based upon my experience, I believed, and so advised Mr. McCall, that if he pleaded guilty in federal court, he would be eligible for a concurrent State sentence. However, never during my representation did I promise Mr. McCall, or intentionally lead him to believe, that his Federal and State sentences would be concurrent.

Collins Aff. ¶ 7.[9] This statement, read in conjunction with petitioner's responses to questions posed to him during the plea colloquy, does not lend credence to petitioner's argument that his understanding was as he contends it to be at present.

Petitioner's claim is substantially similar to that addressed in *Barker*, in which the petitioner alleged that he entered into a plea agreement with a misunderstanding of the offense severity rating resulting from misinformation from counsel. *See id.* In *Barker*, the court concluded that

> even if advice from [petitioner's] trial attorney had led to his misunderstanding of the consequences of his guilty plea, any such confusion was cured by the trial court. The court conducted a thorough examination at the hearing, taking careful and appropriate measures to dispel any confusion on [petitioner's] part before the plea was accepted. Furthermore, [petitioner] admitted that he understood the consequences.

Id. In the present case, petitioner affirmed under oath that "the plea agreement letter sets forth the entire understanding that you have with respect to the entry of plea in this case," Sentencing Tr. at 12, and that "[t]here have been no additional promises . . . made" to him, *id.* If petitioner's understanding was otherwise, his representations to the contrary, i.e., that his understanding was that he would be entitled to concurrent sentences based on representation of counsel, would be cured by the colloquy in which he indicated that his plea was not predicated on something other than the plea agreement.

Petitioner further cannot defeat the characterization of the imposition of concurrent rather than consecutive sentences in state court as a collateral effect or consequence. *See United States v. Parkins*, 25 F.3d 114, 119 (2d Cir. 1994); *United States v. U.S. Currency in the Amount of*

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[9] Petitioner counters Attorney Collins' affidavit by questioning the significance of Attorney Collins' request that he be transferred to federal custody. Such request could reasonably be explained by concerns as to psychological counseling and treatment addressed during his sentencing that could not otherwise be ordered by a federal court while in state custody.

$228,536.00, 895 F.2d 908, 915 (2d Cir. 1990). As a collateral consequence, it is improbable that improper advice as to the effect of a federal sentence on pending state proceedings could constitute ineffective assistance of counsel. *See United States v. Rubalcaba*, 811 F.2d 491, 494 (9th Cir. 1987). Such has been the case in this Circuit with other effects characterized as collateral effects, *see United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975) (deportation), thus it is not apparent that the outcome would differ for pending state proceedings over which a federal court has no control.

III. CONCLUSION

Petitioner's motion to vacate his sentence (Doc. No. 76) is **denied**. Petitioner's motions for Leave to File Amended 2255 Motion (Doc. No. 90) and for Reconsideration of order re: motion for Appointment of Different Counsel (Doc. No. 98) are **denied as moot**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, December ____, 2002.

Peter C. Dorsey
United States District Judge